IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1165 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Nos. 1 and 3 to 5 No. No.2 Yes.

YUSUFJI SULEMANJI KHATRI

Versus

MAHAMADBHAI AMIRBHAI MALEK

Appearance:

MR MI HAVA for Petitioner

MR KS NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 21/07/98

ORAL JUDGEMENT

This is tenant's revision under section 29(2) of the Bombay Rent Act.

The brief facts are that the respondent had let out the disputed accommodation to the revisionist on Rs.35/- p.m. Rent fell due from the revisionist since 1.12.1977. Notice of demand and eviction was sent on

18.1.1979 demanding arrears of rent from 1.12.1977 to 31.12.1978 amounting to Rs.455/-. No action was taken after service of this notice. Second notice was sent by the landlord respondent on 19.2.1980 in which again arrears of rent from 1.12.1977 to 31.1.1980 amounting to Rs.910/- were demanded. This notice was served on the revisionist. Within a period of one month of service of second notice the revisionist remitted Rs. 945/- i.e. an amount in excess of Rs.35/- than the demand contained in the second notice, by money order. It was accepted by the landlord on 10.3.1980 i.e. within one month of the statutory period. Even then the suit was filed on the ground of tenant remaining in arrears of rent for more than six months. Eviction was also sought on another ground that the premises was reasonably and bonafide required by the landlord-respondent for his personal use.

The suit was contested by the revisionist. He pleaded that no rent was due when the suit was filed and the second notice of demand was complied within a month of service of notice. It was denied that the premises was bonafide and reasonably required by the landlord for his personal use. However, it found that since the first notice exhibit 27 dated 18.1.1979 was not complied with within the statutory period, the defendant was liable to be evicted. As such decree for eviction was passed. An appeal was preferred. The Appellate Court agreed with the view taken by the Trial Court. Hence, appeal was dismissed. It is, therefore, this revision.

So far as the finding of the two Courts below on bonafide requirement of the landlord is concerned it is concluded and concurrent finding of fact recorded by the two Courts below against the landlord-respondent and in favour of the tenant revisionist which requires no interference in this revision. No cross objection has been filed against this finding by the landlord-respondent.

The only point for adjudication in this revision is whether the judgments and decrees of the two Courts below are in accordance with law.

The first contention of learned Counsel for the revisionist has been that since no suit was filed after serving first notice, exh.27 dated 18.1.1979 the subsequent suit on the same allegation is not maintainable in asmuch as subsequent notice exh.56A was issued by the respondent on 19.2.1980 and since this notice was complied with, earlier notice stood waived and no decree for eviction could be passed. He further

contended that even under section 12(1) of the Act no decree for eviction could be passed and lastly he contended that under section 12(3)(a) of the Bombay Rent Act also no decree for eviction could be passed because demand made in the second notice was complied with by the revisionist within statutory period.

Coming to the first contention the view taken by the lower Appellate Court as well as by the Trial Court is certainly contrary to law. The lower Appellate Court placing reliance upon cases of Smt.Moorti alias Ram Moorti and others Vs. Smt.Parai Devi and others All India Rent Control Journal, Vol.I, Pg.151 and Abdul Gafoor Vs. Abdeali 1974 All India Rent Control Journal, Pg. 179 & 180 held that the service of second notice does not amount to waiver of the previous notice. This view of the lower Appellate Court is not only contrary to law viz. against section 113 of the Transfer of Property Act but also contrary to pronouncement of this Court in Dahyabhai Vs. Amarchand 12 GLR P.235 and also the view of the Apex Court in Tayabali Jafarbhai Tankiwala Vs. M/s.Asha & Co.and another, 1970, (1) SCC Pg.46.

Section 113 of the Transfer of Property Act provides that a notice to quit stands waived by landlord if he by express or implied consent treats the lease as subsisting. Illustrations (b) to section 113 of the Transfer can safely be quoted as under "(b) A the lessor, gives B the lessee, notice to quit the property leased. The notice expires and B remains in possession. A gives to B as lessee a second notice to quit, the first notice is waived.

The above illustration of section 113 of the T.P.Act leave no room for doubt that service of second notice to quit by landlord amounts to waiver of the previous notice. The Apex Court in Tayabali Jafarbhai Tankiwala V. M/s. Asha & Co.,and another, 1970,(1) Supreme Court Cases, 46, at P.49 interpreted this illustration in similar manner. It was laid down that if only language of the illustrations were to be considered as soon as the second notice was given, first notice would stand waived. It was considered by the Apex Court wholly unnecessary to decide whether for bringing about waiver under section 113 of the Transfer of Property Act a new tenancy by express or implied agreement must come into existence. It was emphasised by the Apex Court that all that has to be seen is whether any act had been proved on the part of the landlord which showed an intention to treat the lease as subsisting provided it was an express or implied consent of the person to whom

the notice was given. This verdict of the Apex Court was followed by this Court in various cases. So, what is material is to find out whether after service of first notice landlord intended to treat the lease as subsisting before serving second notice.

Such intention of the landlord can be express as well as implied. The intention of the landlord in the instant case to treat as subsisting is evidenced from the following facts. Firstly, the notice exhibit 27, was given on 18.1.1979. No suit for eviction was filed after service of this notice. The second notice was given on 19.2.1980. In that notice the tenant was considered to be tenant again and not that he was treated as trespasser or in any other capacity. Hence in the second notice the tenant was considered to be the tenant despite termination of his tenancy through first notice. After the first notice there was clear intention on the part of the landlord to treat the lease subsisting between 18.1.1979 to 19.2.1980.

Silence for a period of more than one year is also indicative of the fact that after so called termination of tenancy through first notice the landlord did not try to evict the tenant. Thus, from the above discussions, it is clear that the service of second notice amounted to waiver of the first notice. Basis of the suit was the first notice and not the second notice. Since first notice stood waived no suit for eviction onthe basis of first notice could be filed and the suit so filed was obviously not maintainable.

Even if for a moment the view taken by the lower Appellate Court is accepted for which there is no reasonable excuse, even then the suit of the respondent could not have been decreed. The question of waiver of notice to quit is material in a case where the suit for eviction is filed under the general law.. If the notice stands waived in a suit for eviction under general law decree for eviction cannot be passed. But if the suit is filed for eviction under the Special Law then merely because of termination the tenancy or waiver of notice to quit decree for eviction cannot be passed or refused to be passed. In addition to termination of tenancy the landlord has to establish that one of the grounds for eviction under the special law exist for passing decree for eviction.

There are two relevant provisions under the Bombay Rent Act, 1947 in this regard. First is section 12(1) of the Act which provides that a landlord shall not

be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act. It is not a case where the landlord alleged that the tenant committed breach of any of the terms of tenancy. Thus under section 12(1) if suit is filed for eviction only on the ground of default in payment of rent decree shall not be passed so long as the tenant pays and/or is ready and willing to pay the entire arrears of rent. In the case under consideration the entire arrears of rent claimed in the second notice besides Rs.35/- more were sent by the tenant through Money Order which was received by the landlord within the statutory period. Thus when the suit was filed no arrears of rent remained due from the tenant. Subsequent rent was also paid by the tenant and as such under section 12(1) no decree for eviction could be passed.

The second relevant provision is section 12(3)(a) of the Act which inter alia provides that where the rent is payable from month to month and there is no dispute regarding the standard rent and the tenant fell in arrears of rent for more than six months or more which he failed to pay within a month of service of notice of demand he shall be liable to be evicted.

As mentioned earlier the tenant had already paid the entire arrears within a month of service of the second notice of demand. The first notice of demand lost its relevance after it was waived. The suit was filed on the basis of the second notice. If the second notice was the basis of the suit it should have been decided by the two Courts below whether the demand made in the second notice was complied with by the tenant within a month of service thereof or not. The two Courts below committed manifest error of law in not applying their mind on this aspect. On the other hand they proceeded to decide the case on the basis of the first notice which not only stood waived but was also not the basis of the suit.

Thus, for the reasons stated above the decree for eviction was wrongly passed by the two Courts below and such decree is certainly contrary to law. The revision has therefore to be allowed and is hereby allowed. judgments and decrees of the two Courts below in so far as the eviction part is concerned are set aside. The decree for mesne profits passed by the Trial Court and confirmed by the lower Appellate Court is maintained to

the extent that amount should be recoverable as rent and not as mesne profits. In the circumstances of the case parties shall bear their own costs.

Sd/-
(D.C.Srivastava, J.)

m.m.bhatt